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No. 84-1158, Misc.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

VICKIE SINGER, *et al.*,

Petitioners,

vs.

ROBERT WADMAN, *et al.*,

Respondents.

VICKIE SINGER, *et al.*,

Petitioners,

vs.

WALTER D. TALBOT,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI FROM COURT OF APPEALS FOR THE TENTH CIRCUIT

DON J. HANSON
(Counsel of Record)
AARON ALMA NELSON
BAYLE, HANSON, NELSON & CHIPMAN
1300 Continental Bank Building
Salt Lake City, Utah 84101
(801) 364-3627

WALTER R. ELLETT
5085 South State Street
Murray, Utah 84107

Attorneys for Respondents Val D. Edrington and South Summit School District

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QUESTIONS PRESENTED

This is an action under 42 U.S.C. § 1983 and the common law for damages arising from the death of John Singer, who was shot and killed by law enforcement officers attempting to arrest him. After extensive discovery, approximately 72 persons were deposed, the District Court granted a motion for summary judgment in favor of all of the defendants. After reviewing the case, the Tenth Circuit Court of Appeals affirmed the judgment of the District Court. The question is, whether or not the District Court and the Circuit Court of Appeals failed to consider the Petitioners' constitutional rights under the First and Fourteenth Amendments of the United States Constitution or whether the District Court and the Court of Appeals have decided a federal question in conflict with the applicable decisions of the above-entitled Court.

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STATEMENT OF THE CASE

In their Petition for a Writ of Certiorari, the Petitioners have in essence sought to establish a conspiracy on the part of the Governor of the State of Utah, various other officials of the State of Utah and the County of Summit, State of Utah, and police officers to violate the civil rights of the Petitioners. They then go on to claim that the District Judge, the Honorable David K. Winder, joined this conspiracy by granting a summary judgment and stifling crucial constitutional issues under the First and Fourteenth Amendments before such issues could develop as a mature

case. Petitioners very carefully avoided mentioning the events out of which this controversy grew and which show the various state and county officials simply sought to administer the duties of their various offices in a lawful manner in response to the actions of a man who recognized no authority other than "his God" and sought to engage in any conduct he chose, lawful or unlawful, and to justify those actions on the basis of his own peculiar religious beliefs. We, therefore, feel that a brief review of those events is in order. Unless otherwise indicated, references are to the District Court's opinion which may be found in the Supplemental Appendix to the Petition for Writ of Certiorari which has been filed in this action.

On March 29, 1973, Vickie and John Singer withdrew their children from the South Summit Elementary School in Kamas, Utah, objecting to the public school's teachings and the environment to which they were being exposed. The incident that triggered the withdrawal was a reader containing pictures of George Washington and Martin Luther King side by side as equal and great men. John Singer viewed King as a traitor to the country and didn't believe textbooks should promote integration and mixture of races (Sup. App. pp. 2-3).

The Utah law, Utah Code Annotated, § 53-24-1 (1981) provides:

> Every parent, guardian or other person having control of any minor between six and eighteen years of age shall be required to send such minor to a public or regularly established private school during the regularly established school year of the district in which he resides; provided:

. . .

b. That in each year the parent, guardian or other person having control of such minor may be excused by the board of education of the district from sending such minor to a public, regularly established private or part time school or class for any of the following reasons:

. . .

(2) That such minor is taught at home in the branches prescribed by law for the same length of time as children are required by law to be taught in the district schools . . .

. . .

d. The evidence of the existence of any reasons for nonattendance must be in each case sufficient to satisfy the board of education of the district in which the child resides, which, if so satisfied, shall issue a certificate stating that the holder is exempt from attendance during the time therein specified

§ 53-24-3, Utah Code Annotated, provides:

Any parent, guardian or other person having control of any minor coming within the foregoing provisions who willfully fails to comply with their requirements is guilty of a misdemeanor.

§ 53-24-4, Utah Code Annotated, provides:

It shall be the duty of the board of education of each district to inquire into all cases of misdemeanor herein defined and to report the same and the offenders concerned to the juvenile court of the district within which the offense has been committed; and it is hereby made the duty of the officers of such juvenile court to proceed immediately to investigate and take appropriate action.

Acting pursuant to the provisions of Utah state law as hereinabove set out, the defendant Val D. Edrington, Superintendent of the South Summit School District, and Mr. Boyd Lake, Pupil Personnel Director, met with Mr. Singer and his wife. The Singers also attended a meeting with the School Board to discuss the situation (Sup. App. p. 3).

Thereafter, having sought the advice of the State School Superintendent, Walter D. Talbot, who was charged by § 53-3-5, Utah Code Annotated, 1953, as amended, with advising superintendents and school boards on all matters involving the welfare of schools, Val D. Edrington wrote a letter to the Singers on May 25, 1973. In the letter he informed the Singers they might teach their children at home "if they are taught in all branches prescribed by law for the same length of time as children are required to be taught in the district schools" and explained to the Singers that if the local board were satisfied that the requirements are being met it would issue a certificate of exemption. If not, the board must report the parents to the juvenile court. The letter further conditioned the grant of a certificate on periodic evaluation of the program by the Superintendent and the Pupil Personnel Director (Sup. App. p. 4). By a letter dated June 16, 1973, John Singer refused to allow periodic evaluation by the school board saying in part, "Also, knowing that my God is more powerful than you and your illegal laws and that only slaves will bow under these conditions; therefore, all I can say is go to hell you and your kind for such unrighteous demands." (Sup. App. p. 4).

Since summer vacation intervened, no further action was taken until October 18, 1973, when the case was referred to the District Juvenile Court for Summit County and a complaint issued against the Singers for neglecting their three oldest children by withdrawing them from school and for failing to comply with the Utah Compulsory Attendance Law, Utah Code Annotated, §§53-24-1 and 3 (1981) (Sup. App. p. 5). The Singers were served with a summons to appear in the Juvenile Court on December 10, 1973, but neither appeared. On January 10, 1974, John Singer was arrested, spent a night in jail and was released on his own recognizance. The Juvenile Court appointed an attorney to represent the Singers who reached an agreement with the South Summit School Board that the Singer children would be taught at home subject to the conditions hereinbefore set out (Sup. App. p. 5).

The Singers permitted their children to be given the same tests given to all children in the South Summit School District during the 1975 school year. The results were found to be lower than the average for children in an equivalent grade. No action was taken at that time (Sup. App. p. 6).

The Singers refused to allow their children to be tested during the 1975-76 school year (Sup. App. p. 6). In August of 1976, the School Board decided to petition the court to appoint an attorney for John Singer so that they might discuss whether to continue the exemption and contacted the Summit County Attorney, Robert W. Adkins. Mr. Adkins filed a motion to appoint a substitute counsel on August 31, 1976, only to find that the action previously filed had been dismissed and there was nothing pending

before the court (Sup. App. p. 7). There followed a number of discussions orally and by letter between the County Attorney, the Superintendent of the School Board and the State Superintendent of Education as to what they should do (Sup. App. pp. 7-14).

On March 9, 1977, at the request of the school board, John Singer attended the school board meeting and after a discussion informed the school board that he would not allow the district to monitor his children's school work or test the children and that he would not keep an attendance record (Sup. App. p. 14). On March 11, 1977, the school board withdrew the certificate of exemption allowing the Singers to teach their children at home and notified the Singers unless they reinstated their children into the district school by March 18, 1977, their case would be reported to the juvenile court (Sup. App. p. 15).

On May 3, 1977, the school board filed another action with the Juvenile Court charging John and Vickie Singer with the crime of contributing to the delinquency and neglect of their children by failing to comply with the requirements of Utah Code Annotated, §§53-24-1 and 3 (supra) (Sup. App. p. 15). On August 10, 1977, additional petitions were filed by the school district charging the Singer children were neglected and habitually truant from school under the provisions of § 55-10-1, Utah Code Annotated, 1953 (Sup. App. p. 17).

On August 23, 1977, a hearing was held on the charge that John and Vickie Singer contributed to the delinquency and neglect of their minor children (Sup. App. p. 17). The Singers, who had previously been advised of their right to

an attorney (Sup. App. p. 15), represented themselves. Robert Orton, an attorney who had been appointed guardian ad litem for the children, represented the children (Sup. App. p. 17). The court found the Singers guilty and ordered that they be committed to the county jail for a period of sixty days and pay a fine of $299. Upon the recommendations of Robert Orton, the court further ordered that the children and the Singers themselves be evaluated by a Dr. Victor Cline, a psychologist at the University of Utah, and suspended the sentence upon compliance with the court order (Sup. App. pp. 19-20).

On August 29, 1977, the Singers filed a notice of appeal from the August 23rd judgment, but that appeal was dismissed for lack of prosecution by the Utah Supreme Court on December 7, 1977 (Sup. App. p. 20).

After some delay and further hearings, the testing was completed; and on November 15, 1977, a hearing was held on the second charge of neglect of the Singer children. At that time the jail sentences and fines previously imposed on the Singers were vacated and the matter continued to December 16 so that the court might consider Dr. Cline's report. The Singers were advised to exhaust all of their abilities with regard to making recommendations to the court concerning the education of their children and to obtain legal counsel for further hearings (Sup. App. pp. 22-23).

John and Vickie Singer failed to appear for the hearing on December 16, 1977. A warrant for John's arrest was issued, and the trial was continued until January 3, 1978 (Sup. App. p. 25). The Singers did not appear for the trial

on January 3, 1978, at which time the trial went forward (Sup. App. p. 27). By an order dated January 18, 1978, the court ordered that the Singer children submit to daily tutoring under the direction of the South Summit School District in subjects widely taught in the schools of Utah, the tutoring to be provided at the expense of the South Summit School District; that the interests and feelings and beliefs of John and Vickie Singer be taken into consideration in the types of materials used, that a plan be proposed by the South Summit School District on or before February 1, 1978, and that the plan be presented to the Singers and they be given five days to respond (Sup. App. p. 28). A plan was presented by the South Summit School District on February 2, 1978, a copy having been sent to the Singers, but the order was totally ignored by the Singers (Sup. App p. 29).

On February 23, 1978, the court ordered the Singers and their children to appear in court on March 14, 1978, to show cause why they should not be held in contempt and why the children should not be placed in custody for failure to comply with the court's prior orders. On February 28, 1978, the sheriff served the orders on the Singers at their farm (Sup. App. pp. 30-31).

Neither the Singers nor their children appeared for hearing on March 14th. The court found John and Vickie Singer in contempt for failing to comply with the January 18th court order. The court imposed a 30 day jail sentence and a $200 fine but stayed the fine and the sentence for 7 days to allow the Singers an opportunity to appeal or obtain an additional stay (Sup. App. p. 31). On March 20th an unsigned notice of appeal was filed with the court which

the Singers disavowed (Sup. App. p. 32). The court then ordered a hearing on April 6th to determine whether in effect said notice of appeal was filed by John and Vickie Singer and to determine if a transcript of the record should be provided counsel appointed to represent them without cost to them and further ordered that the sentences and fines be stayed until the 6th of April. The Singers failed to appear on April 6 but Sheriff Robinson who had visited the Singers in the interim testified that the Singers denied having filed the appeal and the court found that the appeal was invalid. The court further dissolved the stays and placed the children in the temporary custody of the Division of Family Services and directed Sheriff Robinson to take John and Vickie Singer into custody under the 30 day jail sentence. The matter was continued until July 7, 1978 (Sup. App. pp. 32-33).

On June 13, 1978, upon a motion filed by attorney Robert Orton, the court granted a stay of the orders placing the children in the custody of the Division of Family Services and taking the Singer parents into custody for one week (Sup. App. p. 36). On July 3, 1978, another hearing was held on the motion of Attorney Orton to vacate the orders placing the children in the custody of the Division of Family Services and to grant probation to John and Vickie Singer. At that hearing the court vacated the previous orders placing the children in the custody of the Division of Family Services and stayed the judgment of commitment against Vickie Singer but continued the order to place John Singer in custody (Sup. App. p. 38).

On July 17, 1978, John Singer, without a marriage license, secretly married himself to a second wife, Shirley

Black, who at that time was legally married to Dean Black and who did not tell her husband but continued to live at her home in Kamas, Utah (Sup. App. p. 41). On October 14, 1978, Shirley Black and her youngest children moved onto the Singer farm. Her husband, Dean, learned of this when he returned home a couple of days later and found his family gone. About the same time, Shirley Black filed a divorce action against Dean Black (Sup. App. p. 42).

On October 16th the Juvenile Court lifted the stay on the order for the arrest of Vickie Singer and the order placing the Singer children into the custody of the Division of Family Services and ordered the sheriff to arrest Vickie Singer and take the children into custody and deliver them to the Salt Lake Detention Center (Sup. App. p. 44).

Early in October of 1978, Sheriff Robinson solicited the help of Mr. Larry Lunnen, the Utah State Commissioner of Public Safety, and sought the help of other state law enforcement officers to help him in carrying out the arrest of John Singer (Sup. App. p. 43). On October 19, 1978, the officers attempted to arrest John Singer, which attempt was foiled when John Singer managed to pull a gun on the officers (Sup. App. p. 45).

On the same day as the arrest attempt, Judge Peter F. Leary of the Utah State District Court of Summit County in the divorce proceeding between Shirley and Dean Black at a hearing at which Shirley Black was not present and not represented by counsel ordered Shirley Black to forthwith deliver said children to the Sheriff of Summit County and ordered the sheriff to deliver the children to Mr. Black (Sup. App. p. 55).

On October 20th, a complaint was filed against John Singer charging him with three counts of aggravated assault, a third degree felony. On the basis of that complaint Justice of the Peace Reid A. Warner issued a felony warrant for John Singer's arrest (Sup. App. pp. 55-56). On October 30, 1978, the Juvenile Court entered a new order stating that because his previous arrest orders on both John Singer and Vickie Singer had not been executed, the Sheriff of Summit County was ordered to arrest the Singers upon penalty of contempt (Sup. App. p. 56). John Singer was killed during a second attempt to arrest him on January 18, 1979, when he pulled a gun on one of the officers who was participating in the attempt to arrest him (Sup. App. pp. 64-123).

REASONS FOR DENYING THE WRIT

The Petitioners appear to be relying on two points. First, they contend that the fact that the Court in granting a summary judgment in favor of all the defendants wrote a 218 page decision in which he spent 150 pages reviewing the facts somehow shows that the trail judge dismissed the case before the constitutional questions could raise its head from the birthing bed of a jury trial. We believe that logic leads us to a contrary conclusion. An analysis of the Court's decision, which appears in the Supplemental Appendix and at 595 F.Supp. 188, illustrates the Court went to great lengths in reviewing all the evidence contained in the depositions. The standard which the Court applied in granting a summary judgment is outlined on page 128 of the Supplemental Appendix:

> The granting of a summary judgment is proper when there are no factual issues to be determined by

> a jury. In essence, a summary judgment motion requests that the court rule on the case as a matter of law either because there is no dispute as to the facts of the case or because any such dispute is immaterial to a legal resolution. If there is no dispute as to the facts underlying the claims of the parties or if the resolution of any issue of fact will not affect the outcome of the case, the court should grant a summary judgment. Summary judgment, however, is not intended to resolve genuine factual issues, which are reserved for resolution by a jury under our system of justice.

Since the defendants in this case were public officials, the Court also applied the standards set out by this Court in *Harlow v. Fitzgerald,* 457 U.S. 800, 73 L.Ed.2d 396, 102 S. Ct. 2727 (June 24, 1982). In that respect, the Court said (Sup. App. p. 141):

> In effect, the *Harlow* decision abolishes the subjective analysis in determining the availability of an immunity defense to a § 1983 action. Thus, to avoid a summary judgment based on a public official's immunity, a plaintiff must positively raise a question of fact to rebut a showing that the defendant acted within the scope of his authority and was performing a discretionary function. A plaintiff must further demonstrate an issue of fact as to whether the defendant, based on objective factors, actually knew or should have known that his conduct would violate the plaintiff's constitutional rights.

Applying those standards, the Court then went on to conclude that there was no evidence to support a conspiracy

claim (Sup. App. p. 151); the Court then went on to say on page 157 of its opinion (Sup. App. 157):

> With the finding that the prosecution of the Singers was based on probable cause, the court is constrained to find as a matter of law that the defendants did not deprive the plaintiffs of their rights of free exercise, privacy, substantive due process, or the right to be free from malicious prosecution. The only remaining allegations are that the defendants' conduct deprived the plaintiffs of procedural due process and the rights to be free from religious discrimination. There is no evidence to support the allegations that the prosecution was discriminatory. The procedural due process allegation presumably relates to the alleged manipulations of the juvenile court judges, witnesses, and procedures. Giving full consideration to the facts giving rise to these allegations, the court can find no evidence to support an allegation that these actions deprived plaintiffs of their constitutional right to procedural due process or any other independent rights. There is no evidence that the juvenile court judges were influenced by any improper behavior. The court therefore rules that under the allegations of count one, these defendants are entitled to summary judgment.

As an additional ground for its decision, the Court held that the defendants, excepting South Summit School District, would be entitled to immunity even if we had reason to believe the laws of the state of Utah were unconstitutional since they had reason to believe they were not unconstitutional (Sup. App. pp. 156-157).

The next point which the Petitioners raise is that the trial judge, David K. Winder, to whom the case had been

assigned, failed to disqualify himself. In dealing with this question, the Tenth Circuit Court of Appeals whose opinion is shown in the Appendix to the Petitioners' Brief as follows (App. p. 4):

> In the first place, the motion to disqualify was not, in our view, timely filed. The motion was filed about one year after the complaint was filed and after the appellants had suffered some adverse rulings on interlocutory matters. Further, the grounds asserted in the motion to disqualify are legally insufficient (that he was a Mormon, that according to counsel the case involved a challenge to the theocratic power of the State of Utah) (ours). *See* United States v. Ritter, 540 F.2d 459 (10th Cir.), *cert. denied sub nom.* Olson Farms, Inc. v. United States, 429 U.S. 951 (1976); Parrish v. Board of Commissioners, 524 F.2d 98, 100 (5th Cir. 1975), *cert. denied,* 425 U.S. 944 (1976). As for Judge Winder's former partnership with a lawyer for one of the defendants, we do not believe this requires his disqualification. *See* Miller Industries v. Caterpillar Tractor Co., 516 F.Supp. 84 (D. Ala. 1980). Finally, the various remarks made by the district judge during the course of the proceedings do not, as counsel suggests, substantiate the claim of bias or prejudice. On the contrary, in our view, the district judge exhibited commendable patience and restraint throughout this admittedly and understandably emotional affair.

CONCLUSION

While the plaintiffs make some broad, general assertions, they fail to point out any issues of fact which should have affected the outcome of the case. They have failed to point out in what manner any of the plaintiffs' civil rights, constitutional or otherwise, were denied. They do not raise any important questions of federal law which have not been but should be settled by the above-entitled Court. Nor have they shown that the trial court or the appellate court decided any questions in this case in a way in conflict with applicable decisions of the above-entitled Court. By the Petitioners own admission, the appeal in this case was before the Circuit Court of Appeals for two years. An analysis of their opinion shows that all of the issues which the Petitioners now attempt to raise were considered by that Court including the granting of summary judgment where the evidence warrants it; the fact that the evidence did not support the Petitioners' claim that the defendants unlawfully conspired to violate the Petitioners' civil rights and that the trial judge did not commit error in refusing to disqualify himself from hearing the case prior to the granting of a motion for summary judgment. It is, therefore, submitted that the Petition should be denied.

Respectfully submitted,

DON J. HANSON
(Counsel of Record)
AARON ALMA NELSON
BAYLE, HANSON, NELSON & CHIPMAN
WALTER R. ELLETT
Attorneys for Respondents
Val D. Edrington and
South Summit School District